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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1040

JAMES GIVENS ..... *Petitioner*

v.

THE STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court entered in the above entitled case on September 11, 1967, and also denied on re-hearing October 16, 1967.

CITATION TO OPINIONS BELOW

A xerox copy of the opinion of the Supreme Court of Arkansas is attached hereto but has not been reported as of this writing.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on September 11, 1967, and re-hearing denied

October 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

QUESTIONS PRESENTED

1. Whether defendant's incarceration in Pulaski County jail under hold order and subsequent incarceration in Jefferson County jail, with trial passed twice over defendant's strong objections was in violation of defendant's civil, state, and federal rights to a speedy and public trial as guaranteed by the Arkansas and United States of America Constitutions.

2. Whether once such right accrued to defendant the court erred in overruling defendant's motion to discharge the accused and dismiss the information filed herein.

STATEMENT

On April 4, 1966, defendant James Givens, along with one Leroy Martin alias Leroy Murray were arrested in Little Rock, Pulaski County, Arkansas, on a charge of assault with intent to rob allegedly committed March 31, 1966, in Pulaski County, Arkansas, and placed in Pulaski County Jail. On this same date Joe Holmes, prosecuting attorney, Pine Bluff, Jefferson County, Arkansas, filed two informations accusing the said James Givens and Leroy Martin alias Leroy Murray of Armed Robberies committed in Pine Bluff, Jefferson County, Arkansas, on March 29, 1966, and on March 31, 1966. A "hold order" was placed on the accused by Pine Bluff authorities, negating defendant's right to bail. Leroy Martin alias Leroy Murray plead guilty on May 9, 1966, to the Pulaski charge and was sentenced to the penitentiary. On July 13, 1966, as a result of bench warrant dated April 4, 1966,

Pine Bluff authorities took custody of accused and took him from Pulaski Jail to Jefferson County jail. Bail was set at $10,000.00 on each of the two charges.

On September 21, 1966, the case came up for trial in Jefferson County Circuit Court and was passed over defendant's strong objections. On December 1, 1966, it came up again and was passed, again over defendant's vehement objections.

During this incarceration, Jefferson authorities attempted twice to secure guilty plea from defendant, without defendant's attorney being present. On January 23, 1967, defendant was heard before Hon. Henry W. Smith, Jr., in Jefferson Circuit Court on motion to dismiss the information.

The motion was overruled and trial had been set on January 23, 1967, and defendant James Givens was found guilty of robbery and sentenced to seven years. On motion filed February 28, 1967, defendant moved that the order of January 23, 1967, denying motion for speedy trial and praying for discharge of defendant and dismissal of information, be set aside and that the court set aside the verdict of the jury and forever discharge the defendant. The motion was overruled and exceptions saved.

An appeal was perfected to the Supreme Court of Arkansas and in an opinion of September 11, 1967, the court affirmed the judgment and order of the trial court. The petition for re-hearing was filed September 26, 1967 and was denied October 16, 1967.

From such ruling comes this appeal.

REASONS FOR GRANTING THE WRIT

1. *Certiorari should be granted to determine whether or not the defendant's incarceration in Pulaski County*

jail under hold order and subsequent incarceration in Jefferson County jail, with trial passed twice over defendant's strong objections was in violation of defendant's civil, state, and federal rights to a speedy and public trial as guaranteed by the Arkansas and United States of America Constitutions.

This case concerns a flagrant abuse of defendant's rights to a speedy trial as guaranteed by the State and Federal Constitutions. Article 2, Section 10 of the Constitution of the State of Arkansas states "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury . . . "

Indeed this right is one of the most basic fundamentals of justice. It is thusly expressed in *Magna Carta* (1215) "we will sell to no man, we will not deny or defer to any man either justice or right." Sir Edward Coke in his *Institutes* referred to justices, by thirteenth century, armed with commissions of goal delivery, visiting the countryside three times a year. "These justices," he wrote, "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, without detaining him long in prison."

In the early case of *Ware* v. *State*, 159 Ark. 540, Gladstone is quoted, "Justice delayed is justice denied." This case continues: "it is highly important to the public weal that those accused of crime shall be brought to a speedy trial in order that, if guilty, public justice may be meted out without delay." 30 ARL2 463 states the issue: "However, if the trial is delayed by reason of the neglect or laches of the prosecution in preparing for it, when there is a term of court at which it might be had,

such delay is a denial to defendant of his rights to a speedy trial."

Here the record reflects blatant and notorious disregard for defendant's right to a speedy trial. He was arrested in Pulaski County on April 4, 1966, and on April 29, 1966, charged with assault with intent to rob. The hold order from Jefferson County negated his chance for bail relief and accused languished in Pulaski jail until picked up by Jefferson authorities July 13, 1966 (R.9), this based upon Bench Warrant dated April 4, 1967 (R.8). It is not clear to petitioner, nor do the records in Pulaski County reflect, why James Givens was turned over to Jefferson County with the assault charge pending. On the very day after Givens was transferred to Jefferson jail, petitioner's attorney wrote Joe Holmes, Prosecuting Attorney, requesting an early trial (R.47). Defendant's Exhibits 4, 5, and 6 reflect repeated attempts by mail and otherwise to secure trial (R.46-47-48).

It is fundamental that for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on the record in the attitude of demanding a trial, or at least of resisting postmonemnet.

Stewart v. *State* 13 Ark. 720; *Fox* v. *State* 102 Ark. 393; *Ware* v. *State* 159 Ark. 540; *Dillard* v. *State* 65 Ark. 404; *Fulton* v. *State* 128 Ark. 841; *Williams* v. *State* 210 Ark. 402.

The issue is stated in 57 ALR 2nd 306 "The record must show on objection to the delay complained of, otherwise it will be presumed that the delay was with the consent of accused, thereby precluding him from complaining that he was not accorded a speedy trial."

Petitioner is aware of *Arkansas Statute* 43-1705 and is not alleging that the facts have come within the purvue of this Act. Petitioner does allege that this statute is unconstitutional and not attune with recent decisions of the United States Supreme Court. Particular reference is made to *Klopfer* v. *State of North Carolina* decided March 13, 1967, on Writ of Certiorari to Supreme Court of North Carolina. This case is reported in *35 law week 4248.* The opening statement of Chief Justice Warren's opinion squarely states the issue here involved: "The question involved in this case is whether a state may indefinitely postpone prosecution on an indictment without stated justification over the objection of an accused who has been discharged from custody."

The case in question is even stronger than *Klopfer* since there the accused was not held in jail. The *Klopfer* decision quotes *Gideon* v. *Wainright,* 372 U.S. 335 (1963) and *Pointer* v. *Texas,* 380 U.S. 400 (1965). The latter case held: "In the light of Gideon, Malloy and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States and can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that guarantee, like the right against compelled self-incrimination, is to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."

Here the accused was held in jail from April 4, 1966, to date of trial, January 23, 1967 (R.12-a). Trial was

originally set for September 21, 1966, and passed, then set December 1, 1966 and passed, at all times over appellant's strong objections. On two occasions accused was brought before Judge Smith in an attempt to secure a guilty plea without petitioner's attorney being present (R.34-36). Of significance is the fact that there have been two criminal jury trials in Jefferson Circuit Court since April 8, 1966 (R.29).

2. *Certiorari should be granted to determine whether or not once such right accrued to defendant the court erred in overruling defendant's motion to discharge the accused and dismiss the information filed herein.*

Assuming that petitioner's motion should have been granted, could Jefferson Circuit Court proceed with trial of accused? 50 ALR2 9+3 states: "Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense."

When an issue of law or fact is passed upon by a court, and an order is made by it which determines the rights of the parties in the action finally, so far as that court is concerned, then such order becomes the final determination of the cause from which an appeal will lie. *Ware* v. *State, supra; Batesville* v. *Ball,* 100 Ark. 496.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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